



FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

Brett G. Kappel
Vorys, Sater, Seymour & Pease LLP
1828 L Street, NW
Eleventh Floor
Washington, DC 20036

APR - 1 2009

RE: MUR 6080
The Clarion Fund, Inc.
Aish HaTorah International

Dear Mr. Kappel:

On October 1, 2008, the Federal Election Commission notified your clients of a complaint alleging violations of certain sections of the Federal Election Campaign Act of 1971, as amended. On March 27, 2009, the Commission found, on the basis of the information in the complaint, information provided by your clients, and information available to the public, that there is no reason to believe The Clarion Fund, Inc. and Aish HaTorah International violated 2 U.S.C. §§ 441b(a) and 441e. Accordingly, the Commission closed its file in this matter.

Documents related to the case will be placed on the public record within 30 days. See Statement of Policy Regarding Disclosure of Closed Enforcement and Related Files, 68 Fed. Reg. 70,426 (Dec. 18, 2003). The Factual and Legal Analysis, which explains the Commission's finding, is enclosed for your information.

If you have any questions, please contact Phillip A. Olaya, the attorney assigned to this matter, at (202) 694-1571.

Sincerely,

A handwritten signature in black ink, appearing to read "Mark D. Shonkwiler", followed by a horizontal line.

Mark D. Shonkwiler
Assistant General Counsel

Enclosure
Factual and Legal Analysis

29044233772

FEDERAL ELECTION COMMISSION

FACTUAL AND LEGAL ANALYSIS

MUR 6080

RESPONDENTS: The Clarion Fund, Inc.
Aish HaTorah International

I. INTRODUCTION

This matter concerns The Clarion Fund, Inc. ("Clarion"), a 501(c)(3) tax-exempt organization that distributed approximately 28 million DVD copies of OBSESSION: RADICAL ISLAM'S WAR AGAINST THE WEST (2006) ("OBSESSION"), a film about radical Islam, through paid newspaper inserts shortly before the 2008 general election. Although the film does not mention any federal candidate by name, Complainant alleges that Clarion produced and distributed the DVD to encourage the election of Republican presidential candidate John McCain in violation of 2 U.S.C. § 441b of the Federal Election Campaign Act of 1971, as amended ("the Act"). See MUR 6080 Complaint. The complaint also alleges that Clarion, because of its close ties to an Israeli-based not-for-profit corporation, Aish HaTorah International, may have used contributions from foreign nationals to fund distribution of the film in violation of 2 U.S.C. § 441e.

II. FACTUAL BACKGROUND

In November 2006, Clarion incorporated as a 501(c)(3) tax-exempt organization in Delaware. See <http://www.clarionfund.org>. Clarion's officers include: Robert Shore (Rabbi Raphael), Rabbi Henry Harris, and Rebecca Kabat. Clarion's website describes the organization as a "non-profit, non-partisan organization whose mission is to educate Americans about issues of national security" through "film production and distribution, online education, and college

29044233773

1 outreach.” *Id.* While Clarion’s website includes information about and links to the film, it does
2 not include any other organizational information about Clarion or about the producers of
3 OBSESSION and provides only phone numbers and generic email addresses for additional
4 information, press inquiries, or screening requests.

5 OBSESSION was produced in 2005 and first released in 2006. *See* MUR 6080 Response.
6 The hour-long film, which makes no references to any candidates for federal office, includes
7 graphic images of terrorism, footage of Middle Eastern news programs that advocates anti-
8 American and anti-Western views and violence, and compares the threat of radical Islam to Nazi
9 Germany. The film credits list Shore, who is Canadian, as a producer. *See* OBSESSION. Shore is
10 also a former director of Aish HaTorah International, an Israeli-based organization that shares a
11 New York City mailing address with Clarion. *See* Haaretz.com, ‘*Obsession*’ *Stokes Passions,*
12 *Fears and Controversy*, <http://www.haaretz.com/hasen/spages/873843.html> (last visited
13 December 18, 2008); *see also* Inter Press Service News Agency, *Politics: Neo-cons, Ex-Israeli*
14 *Diplomats Push Islamophobic Video* (Sept. 24, 2008) available at [http://ipsnews.net/print.asp?](http://ipsnews.net/print.asp?idnews=43983)
15 [idnews=43983](http://ipsnews.net/print.asp?idnews=43983) (last visited Dec. 19, 2008). Another Canadian, operating under the alias Peter
16 Mier (whose true identity remains unknown), reportedly provided about 80 percent of the film’s
17 budget and is the executive producer of the film. *See* Haaretz.com, *supra*. Clarion requests
18 viewers to register for screenings of the film on the website of Aish HaTorah, the Israeli-based
19 non-profit mentioned above. *See id.*

20 In September 2008, Clarion distributed the film to over 70 newspapers located in 14
21 states that were regarded as “swing” or “battleground” states in the upcoming presidential
22 election. *The Secret Money Project: Charity Floods Swing States With Anti-Islam DVD* (NPR
23 radio broadcast Sept. 26, 2008) available at <http://www.npr.org/templates/story/story.php?>

29044233774

1 storyId=95076174 (last visited December 19, 2008). At the time of the distribution, Clarion's
2 website reportedly included an endorsement, since removed, of then-Republican presidential
3 candidate John McCain. See Gary Dwight Miller, *DVD on Radical Islam Offends Lemoyne*
4 *Recipient*, THE PATRIOT NEWS, Sept. 11, 2008, at A01. The website endorsement reportedly
5 discussed Democratic presidential candidate Barack Obama and concluded, "'McCain's policies
6 seek to confront radical Islamic extremism and terrorism and roll it back while Obama's,
7 although intending to do the same, could in fact make the situation facing the West even worse.'"
8 *Id.* (quoting Clarion's since-removed endorsement). When the question of whether a 501(c)(3)
9 organization should be making political endorsements was brought to their attention, Clarion
10 acknowledged the statement "'crossed the line' into an endorsement of sorts" and agreed to take
11 the statement off its website *Id.*

12 III. ANALYSIS

13 A. Independent Expenditures

14 At issue is whether Clarion made an impermissible independent expenditure in violation
15 of 2 U.S.C. § 441b(a) by distributing DVD copies of OBSESSION through paid newspaper inserts
16 in targeted states prior to the 2008 general election. The Act prohibits any corporation from
17 making a "contribution or expenditure in connection with any election to any political office."
18 2 U.S.C. § 441b(a); 11 C.F.R. § 114.2(a). An independent expenditure is "an expenditure by a
19 person expressly advocating the election or defeat of a clearly identified candidate" and "that is
20 not made in concert or cooperation with or at the request or suggestion of such candidate, the
21 candidate's authorized political committee, or their agents, or a political party committee or its
22 agents." 2 U.S.C. § 431(17)(A), (B); 11 C.F.R. § 100.16. A person (including a political
23 committee) who makes an independent expenditure aggregating \$10,000 or more at any time up

29044233775

1 to the twentieth day before the date of an election is required to file a report describing the
2 expenditure with the Commission within 48 hours. 2 U.S.C. § 434(g)(2)(A); 11 C.F.R. §
3 109.10(c).

4 Clarion's distribution of OBSESSION does not constitute an independent expenditure
5 because the film does not contain express advocacy in the form of language comparable to the
6 illustrative phrases set forth in the Commission's implementing regulations at 11 C.F.R. §
7 100.22(a) or 100.22(b). The complaint in the present matter fails to identify any specific
8 instance in OBSESSION that clearly identifies a federal candidate or advocates for the election or
9 defeat of such a candidate. In a previous matter involving the production and distribution of the
10 documentary film, FAHRENHEIT 9/11, the Commission found no reason to believe that
11 expenditures associated with the film constituted independent expenditures because the film did
12 not expressly advocate the "election or defeat of a clearly identified candidate." See First
13 General Counsel's Report ("FGCR") in MURs 5475 (Dog Eat Dog Films, Inc.) and 5539
14 (FAHRENHEIT 9/11) at 17. By comparison, OBSESSION both fails to identify a federal candidate
15 and lacks express advocacy. Thus, its distribution does not constitute an independent
16 expenditure.

17 Regarding the statement on Clarion's website, the Commission's regulations permit a
18 corporation to publicly announce its endorsement of a candidate so long as disbursements for the
19 public announcement remain *de minimis*. 11 C.F.R. § 114.4(c)(6). The available information
20 suggests that Clarion did not make more than a *de minimis* disbursement in posting its
21 endorsement. However, restrictions under the Internal Revenue Code prohibited Clarion, a
22 501(c)(3) tax-exempt organization, from posting a statement on its website in support of John
23 McCain, which it later removed. See 11 C.F.R. § 114.4(c)(6) (advising that "The Internal

29044233776

1 Revenue Code and regulations . . . should be consulted regarding restrictions or prohibitions on
2 endorsements by nonprofit corporations described in 26 U.S.C. 501(c)(3)."). Clarion's website
3 endorsement of McCain, wholly separate from the film, does not appear to affect the analysis of
4 whether the distribution of OBSESSION constituted an independent expenditure. Further, any
5 violation of Clarion's § 501(c)(3) status is a matter for the IRS, not this agency.

6 **B. Electioneering Communications**

7 There is a further issue whether OBSESSION is a prohibited electioneering communication,
8 though the complaint fails to explain that assertion. Under 11 C.F.R. § 100.29(a), an
9 "electioneering communication" is defined to include any broadcast, cable, or satellite
10 communication that refers to a clearly identified candidate for Federal office; is publicly
11 distributed within 30 days before a primary election; and is targeted to the relevant electorate in
12 the case of a candidate for the House of Representatives.¹ "A clearly identified candidate . . .
13 means that the candidate's name, nickname, photograph, or drawing appears, or the identity of
14 the candidate is otherwise apparent through an unambiguous reference . . ." 11 C.F.R. §
15 100.29(b)(2). A broadcast, cable, or satellite communication "means a communication that is
16 publicly distributed by a television station, radio station, cable television system, or satellite
17 system." 11 C.F.R. § 100.29(b)(1). "[P]ublicly distributed" means "aired, broadcast, cablecast
18 or otherwise disseminated through the facilities of a television station, radio station, cable
19 television system, or satellite system." 11 C.F.R. § 100.29(b)(3)(i).

¹ Although the Act prohibits the use of corporate funds for electioneering communications, in *Federal Election Commission v. Wisconsin Right to Life, Inc.*, 551 U.S. 449, ___, 127 S. Ct. 2652, 2667 (2007) (*WRTL*), the Supreme Court limited the ban against corporate funding of electioneering communications to ads that are the "functional equivalent of express advocacy" in that they are "susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate." *Id.* The Commission subsequently incorporated the principles of the *WRTL* opinion into its regulations governing permissible uses of corporate and labor organization funds for electioneering communications at 11 C.F.R. § 114.15. See Final Rule on Electioneering Communications, 72 Fed. Reg. 72,899, 72,914 (Dec. 26, 2007).

1 The film is not an electioneering communication because (1) it does not mention or
2 clearly identify a federal candidate and (2) the film does not appear to meet the regulatory
3 definitions of a "broadcast, cable, or satellite communication" because Clarion mailed the film
4 for the private viewing of the recipient. Accordingly, the film is not a prohibited electioneering
5 communication.

6 **C. Contributions by Foreign Nationals**

7 Lastly, there is an issue whether foreign national contributions were used to produce and
8 distribute OBSESSION. It is unlawful for a foreign national, directly or indirectly, to make a
9 contribution or donation of money or other thing of value in connection with a Federal, State, or
10 local election, or to a committee of a political party. 2 U.S.C. § 441e(a)(1)(A), (B); 11 C.F.R. §
11 110.20(b). A "foreign national" is an individual who is not a citizen of the United States or a
12 national of the United States and who is not lawfully admitted for permanent residence. 2 U.S.C.
13 § 441e(b)(2). The term likewise encompasses "a partnership, association, corporation,
14 organization, or other combination of persons organized under the laws of or having its principal
15 place of business in a foreign country." 2 U.S.C. § 441e(b)(1) (citing 22 U.S.C. § 611(b)(3)).
16 Additionally, a foreign national may not directly or indirectly make an expenditure, an
17 independent expenditure, or a disbursement in connection with a Federal, State, or local election.
18 2 U.S.C. § 441e(a)(1)(C); 11 C.F.R. § 110.20(f). Likewise, Commission regulations prohibit
19 foreign nationals from directing, dictating, controlling, or directly or indirectly participating in
20 the decision-making process of any person, such as a corporation, with regard to such person's
21 federal or nonfederal election-related activities, including decisions concerning the making of
22 contributions, donations, expenditures, or disbursements in connection with elections for any
23 Federal, State, or local office. 11 C.F.R. § 110.20(i).

29044233778

1 Complainant asserts that “the funding for the production, marketing and distribution of
2 ‘Obsession’ may have originated from Israeli-based Aish HaTorah International.” *See* MUR
3 6080 Complaint. The basis of the allegation is that the individuals who incorporated Clarion
4 “are reported to serve as employees of Aish HaTorah” and that Clarion shares a mailing address
5 with Aish HaTorah. *Id.* The complaint again relies on media reports that viewers registered for
6 screenings on Aish HaTorah’s Website. *Id.* Nevertheless, because the film distribution did not
7 constitute an independent expenditure or electioneering communication, the prohibition against
8 foreign nationals making expenditures does not apply. Given that the film does not reference
9 any election or candidate for office, and in the absence of any other information that otherwise
10 might establish that disbursements to distribute the film were “in connection with a Federal,
11 State, or local election,” there is no basis to conclude that Respondents violated 2 U.S.C. § 441e.

12 **IV. Conclusion**

13 Accordingly, the Commission finds no reason to believe that The Clarion Fund, Inc. and
14 Aish HaTorah International made an independent expenditure or an electioneering
15 communication in violation of 2 U.S.C. § 441b. Further, the Commission finds no reason to
16 believe that Aish HaTorah International or The Clarion Fund, Inc. violated 2 U.S.C. § 441e.

29044233779